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VOL. 27 FEBRUARY-MARCH, 1952 Nos. 6 and 7

COMMENTS ON THE FEDERAL RULES FOR DISCOVERY

By George P. Dike*

BEFORE beginning it may be useful to say that for the first ten years of my practice, the rules in force in the Federal Courts required all evidence to be taken by deposition. For the next twenty-five years there was genuine trial in open court, while for the past thirteen years, I have tried cases under the Rules of Civil Procedure. I have reached the age at which I no longer do any trial work and, therefore, feel that I can speak critically both of lawyers and courts and with complete frankness. Probably I am one of a few people present who has had real experience with trial by deposition.

Is something wrong with the Federal procedure on discovery? There certainly is. The proof of it is that it has been thought necessary to hold this meeting and that we have come together to discuss it. What is wrong with the procedure? My answer is:—The failure of the rules to distinguish *on the one hand* between discovery, *i. e.*, the ascertainment of facts necessary to enable the parties to define the issues and prepare for trial and *on the other hand* the presentation of evidence to support the issues. In other words, ascertainment of facts preparatory to trial and proof of the facts at trial. What is the result? The preliminary proceedings have grown until the whistle is bigger than the boiler.

The rules as to discovery, *i. e.*, interrogatories, requests for admissions and depositions, seem to have been drawn on the theory that by filing his complaint, the plaintiff has made a case and is thereafter entitled to roam at will through the books, documents

*Member of the Bar of Boston, Massachusetts. This article is reprinted from the Massachusetts Law Quarterly, October, 1951. It presents a view to be compared with that of U. S. District Judge Wm. C. Mathes in his article in the January, 1952, issue of the BULLETIN at page 163. Mr. Dike's paper was presented to the 1951 meeting of the Section of Judicial Administration of the American Bar Association.

and records of defendant, and in addition to compel him to prepare statements and computations and furnish figures no matter how great the difficulty and the expense involved. A mongrel procedure has resulted which has many of the characteristics and objections of trial by deposition which was discarded forty years ago. *I fear that in our interest in reconstructing the grist mill we have overlooked the quality of the meal it produces.*

The object of a trial is to present all the facts to the Court in the simplest, quickest, most complete form at the least expense to the litigant and in the way which will enable the judge or jury to do justice most certainly and most expeditiously.

Up to 1912, equity and non-jury cases were tried wholly by deposition. The depositions were taken in the lawyer's offices, at the convenience of the lawyers and witnesses. The witnesses were examined and cross-examined. Pages and pages were filled with objections and arguments over objections, and the objections were subsequently ignored by the Court. The right of cross-examination was horribly abused. There was no one to curb the lawyer and protect the witness. I remember at least one occasion on which the witness was so incensed at the lawyer's questions and behavior that blows resulted. I was not the lawyer.

After the depositions were taken the whole mass—objections, arguments and all—was printed, briefs were prepared and printed, and the case was argued and finally decided without the Court ever having seen a witness. *Always, the veil of the printed word hung between the Judge and the witness.*

Have you ever seen the District Court record of any equity case tried before 1912? I have in my office the printed volumes of a number of such cases in many of which I took part. The other day I picked up an old record and found that testimony by deposition was taken on forty-four days between January 19, 1898, and April 28, 1900, a period of two years and three months. I shudder when I recollect the total injustice of the procedure. *The expense was enormous and delays terrific.*

The upheaval which resulted in the equity rules of 1912—which I always think of as the "new equity rules"—wiped out all that. They provided that "In all trials the testimony of witnesses shall be taken orally in open Court . . ." except, of course,

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AN EPISODE IN NAVAL JUSTICE

By Leon David*

Leon Thomas David

THE revision of the manuals of courts-martial, the establishment of uniform standards for military-naval justice, are uppermost in the background of interests of judge advocates at this moment. We have come a long way in our concepts of discipline and authority, and in their vindication by courts-martial on one hand, with preservation of justice and individual right on the other. For one picture of naval justice as it was, I want to carry you back with me for a little over one hundred years.

On December 28, 1842, a Court of Inquiry convened at Brooklyn Navy Yard, composed of high-ranking eminent officers. The matter at hand was serious, and as we would say, "very hot." Three weeks before, in the South Atlantic, the commander of the USS Somers had hung the son of Secretary of War Spenser from a yardarm for mutiny, along with two companions, without a court-martial, and now, before the Court was pleading, "In the necessity of my position I found my law; and in that necessity, I trust for justification." This Court of Inquiry had not concluded when a General Court-Martial was ordered for the Commander, Alexander Slidell MacKenzie, by Secretary of the Navy Upshur, charging that the executions were murder, and that they had been without justifiable cause.

The Court-Martial spent forty days on the trial, unprecedented in length before that time. The story which unfolded was this:

Commander Alexander Slidell (who had added his mother's surname of MacKenzie) was the brother of John Slidell, who, some years later, as Confederate States commissioner to England was to be forcibly removed from the HMS Trent in 1861 by Captain John Wilkes, thereby almost embroiling us in war with Britain. Commander MacKenzie had written many books of adventure and biography, popular at that time, and as well was known as an able and efficient officer.

The USS brig *Somers*, which he commanded, was about 125

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tons burden, twenty-five foot beam, was a swift sailer, mounted ten guns, and had a crew of 120 men. These were nine ordinary seamen, and some ninety-nine apprentice seamen who were boys of from 13 to 18 years of age. Then there were nine officers, six of whom were midshipmen. Midshipman Philip Spenser, son of the Secretary of War, was assigned to the Somers in September, 1842. As a lad, he had favored stories of high adventure, of freebooting and piracy. Assigned to the Brazil station, he had not been a help to his commanders and had a reputation for drunkenness. Hearing he was to be assigned to the *Somers*, MacKenzie sought to have him transferred, but unavailingly. Spenser was on board when the *Somers* sailed for Africa on September 12, 1842, to deliver dispatches and join in the patrols protecting our commerce. One of the ordinary seamen aboard was Crowell, whom the crew said had served on a slaver, and had been imprisoned by the Spaniards in Morro Castle. Another seaman, Small, was fairly well educated, and like Crowell, knew navigation.

On the way to Africa, Spenser was a man apart. He associated little with the officers, and with them was reserved and correct in deportment. But he joked with the crew, which was not done in those days. Likewise, in two months, he drew 725 cigars and 11 pounds of tobacco from ship's stores, and gave them to the boys before the mast. He bribed a steward to steal for him some medical brandy, since the Commander ran an ostensibly dry ship. When reprimanded for different minor breaches of duty, members of the crew heard him say that the Commander was a humbug, and that it would give him real pleasure to "roll him overboard."

There were others who were less outspoken. There were many punishments. As to the crew of boys, the Commander believed that to spare the cat would spoil the boy, though all later testified he was just.

The ship had reached Africa, and Madeira was behind. The crew was restless and sluggish. Then a bombshell broke upon Commander MacKenzie. After the purser Ware was "dressed down" for an infraction of discipline, Ware advised him that Midshipman Spenser, believing Ware disaffected, had disclosed to him that a plan was afoot to seize the vessel; some twenty men

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PROTECTION OF LAWYERS FROM LIBEL

By Carl L. Shipley*

THE most valuable asset the lawyer has is his professional reputation. Without the confidence and goodwill of the community, his skill, learning, and experience, count for little. However, despite the zealousness of courts in other jurisdictions in protecting the professional reputation of the lawyer, there is only one reported case of a defamation suit by a lawyer in the District of Columbia, and it was decided in 1913.[1] The courts in other jurisdictions have had the problem before them with some frequency since that time. Stated as a general proposition, the courts have held that any statement published of a lawyer which tends to injure or disgrace him as a member of his profession is actionable. Oral or written words which impute to him a want of the requisite qualifications to practice law or which charge him with dishonest or improper practices in the performance of his professional duties are actionable *per se*.[2] In view of the absence of case law on the point in the District of Columbia, it is a fair assumption that if confronted by a proceeding in which libel of a lawyer was at issue, the courts here would be guided by decisions on the point in other jurisdictions. Therefore, a brief review of the recent case law in other jurisdictions may be of value in determining the extent to which a member of the bar of the District of Columbia may look to the courts here to protect his most valuable professional asset, his reputation as a lawyer. The following types of charges have been litigated and offer some guide posts.

Ignorance of the Law

In 1942 the *New Orleans Item* printed an editorial which charged Kemble K. Kennedy, a member of the Louisiana bar, with being ignorant of the law and incompetent, and described him as a "pettifogger" (which the court defined as a lawyer who deals in petty cases, or whose methods are mean and tricky, or an incompetent or quack practitioner). For this attack on his professional skill and reputation the court awarded lawyer Kennedy $7,500.00 in damages.[3]

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*Of the District of Columbia Bar. This article is reprinted from The Journal of the Bar Association of the District of Columbia, November, 1951.

[1]Metzger v. Washington Post Co., 40 App. D. C. 565 (1913).

[2]53 C. J. S., p. 85; Kennedy v. Item Co., 213 La. 347 (1948).

[3]Kennedy v. Item Co., 213 La. 347 (1948).

Aiding Jail Breaks

In October 1946 Joseph A. Gladney, attorney in Baton Rouge, Louisiana, was searched by the sheriff before being allowed to visit his client in jail. The sheriff phoned the story to the *Morning Advocate*, a local paper, which published his statement, "There are some dangerous prisoners in the jail and I am taking no chances. I would not be surprised at anything Gladney would do, so he will be searched everytime he enters the jail." In an action against the sheriff for defamation the lawyer was awarded $750.00 damages on the theory that the sheriff's statement implied the lawyer was the kind of a person who might furnish dangerous prisoners implements usable in a jail break, making the statement libelous *per se*.[4]

Influencing Judge

In 1949 a New York newspaper printed a story about a guardianship action in which William Perry, a Massachusetts attorney, had prevailed in having a youngster awarded to his clients, the Hershons. The article stated that the judge "was formerly a law partner of William Perry, attorney for the Hershons, and has returned to that partnership." This was held to be libelous *per se* because it conveyed to the average reader the idea that the lawyer had tampered with the processes of justice and had influenced a decision in his favor because of his former partnership with the judge and his contemplated re-association with the same judge.[5]

Believing in Communism

Not long ago the magazine *Reader's Digest* contained an article entitled "I Object to My Union in Politics" in which one passage stated that Sidney S. Grant, a Massachusetts lawyer, "recently was a legislative representative for the Massachusetts Communist Party." Judge Learned Hand concluded that although the article did not say Grant was a member of the Communist Party, it did imply that he was its agent and a believer in its aims and methods. An implication that a lawyer is a "fellow traveller" is libelous *per se* according to Judge Hand.[6]

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[4]Gladney v. De Britton, 218 La. 347 (1950).
[5]Perry v. News Syndicate Co., 99 N. Y. S. 2d 629 (1950).
[6]Grant v. Reader's Digest Assn., 151 F. 2d 733 (1945).

JUDICIAL ROBES

By Vernon W. Hunt*

Vernon Hunt

THE article entitled "Judicial Robes," by Judge Stanley Mosk, appearing in the last issue of the LOS ANGELES BAR ASSOCIATION BULLETIN,** seems to invite further comment, and I feel that further comment is quite advisable and, in fact, necessary, in view of the frequent quoting of insulting remarks reported to have been made by Judge Jerome Frank and in view of the inferences that controversies are raging among the judges over the subject of the wearing of judicial robes.

I have never heard anyone else express such insulting views concerning the wearing of judicial robes as are attributed to Judge Jerome Frank, and I feel confident that such views would not be shared by many people. Some of our judges in Los Angeles County do not wear robes, but that is their personal privilege and is a matter of personal preference with them. They just simply do not like to wear robes and they do not want to be bothered with them, nor do they want to incur the heavy expense which accompanies the purchase and maintenance of them. I know of no raging controversy among the judges. In fact on my own court there is no controversy—those of us who wish to wear robes, do so, and those who do not wish to wear them, do not.

Personally, I have been wearing a robe for years and so have many of my colleagues on the bench, and we expect to continue to do so because we feel that it lends to the dignity of the court. We have no apologies to make. On the other hand, I make no criticism of those of my colleagues who personally prefer not to wear a robe.

I am sure that the citizens who come into our courts to obtain justice do not share the views of Judge Jerome Frank. We frequently find jurors asking us why it is that not all of our judges wear robes and paying compliments to those who do wear robes.

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*Judge, Municipal Court, Los Angeles Judicial District.

**27 L. A. BAR BULLETIN 167 (January, 1952).

In the year 1948 one of the outstanding citizens of San Pedro wrote a letter to the Presiding Judge of my court concerning the wearing of a robe by myself, and when this letter was read at the next judges' meeting it made such an impact upon our judges that quite a number of them who had not previously worn robes decided to do so thereafter.

Inasmuch as I believe that this letter truly reflects the views of the average citizen and expresses these views in a very thought-provoking manner, I quote from it as follows:

> "The fact that Judge Hunt wears a judicial robe on the bench here is appreciated as complimentary to the citizens of San Pedro. They like it and speculate as to why, in other Courts, some magistrates have laid aside the robe.
>
> "It may be considered uncomplimentary to a community for the Court to abandon the symbols of the majesty and dignity that are cherished by our citizens who look to the halls of justice for the strongest and most lasting bulwark of our freedom, and so we applaud the wearing of a robe in this Court and suspect that if the judges knew the sentiment of many who attend our Courts that robes would be uniform."

Nothing that I can say could possibly add to the effectiveness of these views expressed by this citizen.

NEED FOR GUIDANCE IN LEGAL ETHICS

By H. Eugene Breitenbach*

THE number and novelty of questions of legal ethics that arise among members of the Los Angeles Bar are amazing. We are constantly reminded thereby of the need, for better guidance in matters of ethics, for greater familiarity with the Canons of Professional Ethics of the American Bar Association, with the Rules of Professional Conduct of the State Bar of California, and especially for better availability of the more than 185 formal opinions prepared by the Ethics Committee of the Los Angeles Bar Association down through the years in response to questions presented by attorneys. Only a small percentage of such questions either require or justify a formal opinion.

These questions nearly always manifest a sincere desire for guidance in professional conduct, in a complex and ever changing legal and social order. A helpful but somewhat inadequate guide is a paraphrase of a French proverb that as to proposed conduct involving legal ethics, likewise as with a woman's chastity: "to question it is to condemn it."!

Novel questions, such as the propriety of televised legal quiz programs, and proper limitations on the use of electronic recording of telephone conversations, both subjects of recent opinions, indicate that attorneys must keep abreast of the times, in the application of sound principles of ethics to new media and to new situations.

Therefore, it is respectfully suggested that the Los Angeles Bar Association or some generous donor or possibly some legal publisher, should print and furnish to each member, a booklet setting forth the Canons of Professional Ethics of the American Bar Association, the Rules of Professional Conduct of the State Bar of California, and the opinions rendered by the Los Angeles Bar Association Committee on Legal Ethics on specific factual situations.

Although advisory only, these opinions, ranging from the propriety of certain holiday greetings, to conduct of televising quiz programs, would provide both a valuable storehouse of information, and also a helpful guide to the application of unchanging principles of professional conduct, to a changing world.

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*Chairman of the Ethics Committee of the Los Angeles Bar Association.

OPINIONS OF THE COMMITTEE ON LEGAL ETHICS, LOS ANGELES BAR ASSOCIATION

OPINION NO. 185
(November 21, 1951)

ADVERTISING AND SOLICITATION—LETTERHEAD OF CORPORATION CARRYING NAME OF ATTORNEY. WHERE AN ATTORNEY in general practice is counsel for a corporation which does not engage in the practice of law or solicit legal business, it is not unethical for the corporate letterhead used solely by such attorney in connection with its affairs to carry his name with a designation such as "legal counsel" or "corporation counsel." It would not be proper, however, for other officers or agents of the corporation to use such letterhead, nor would it be ethical for the attorney to use the letterhead in matters not directly involving the corporation.

An attorney in general practice is counsel for a corporation engaged in manufacturing. The corporation does not engage in the practice of law in any way nor solicit legal business. The attorney asks whether his name may be printed on corporate stationery with a descriptive designation such as "legal counsel" or "corporation counsel." The attorney states that such stationery of the corporation will be used solely by him in dealing with the legal affairs of the corporation.

While it is the opinion of the Committee that it would not be unethical for the attorney to use such letterhead for the purpose stated, the Canons of Professional Ethics must constantly be borne in mind.

Canon 27 of the Canons of Professional Ethics of the American Bar Association provides in part as follows:

> "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

Canon 35 of the Canons of Professional Ethics of the American Bar Association provides in part as follows:

> "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries."

It is clear that, on the facts stated, there is no violation of either of the foregoing Canons. There is no advertising or solicitation because nothing more appears in such a letter than would appear by the signature of the attorney as counsel for the corporation in connection with any correspondence which he may have on its behalf. Likewise, the corporation is not intervening between attorney and client. The particular legal services performed concern only the corporation's own affairs.

The Committee deems it necessary to make it clear that such stationery cannot ethically be used by any person other than the attorney himself. Further, the attorney may not ethically use such stationery in matters not directly affecting the business of the corporation. A corporation should not be placed in the position of selling an attorney's professional services. (*E.g.*, Opinions 16, 43, 83, Los Angeles Bar Association.)

This opinion, like all opinions of this Committee, is advisory only.

* * *

OPINION NO. 186

(December 11, 1951)

TELEVISION PROGRAMS—ANONYMOUS REPLIES TO LEGAL QUESTIONS OF GENERAL AND POPULAR INTEREST—An attorney should not appear, even anonymously, on commercially sponsored telecasts for the purpose of answering or discussing legal questions of general interest, based upon queries submitted by the public, because:

(a) Appearing through such medium, the attorney is thus placed in a position which is greatly susceptible of misconstruction of his status and purpose;

(b) It would be practically impossible under such circumstances, to avoid violating Canon 40, A.B.A. (prohibition against advising in respect to individual rights).

A member of the Bar inquires whether it would be ethical for him to appear in a series of television programs for the purpose of answering legal questions of popular interest. The inquiring attorney states that his name would never be used and that he would appear as "Mr. Attorney" or "Mr .Lawyer," and that he would at all times be anonymous; answering queries strictly from the general points of law. Further, he states that the entire idea of the programs would be to promote a public service in respect of acquainting the lay public with a few fundamental principles of law and in urging early consultation with an attorney on any legal problem.

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LOS ANGELES BAR ASSOCIATION COMMITTEE ON MALPRACTICE (PROGRESS REPORT)

EDITOR'S NOTE: The Association's Committee on Malpractice, at the request of the Board of Trustees, has been studying the matter of the availability of medical doctors as expert witnesses for the plaintiff in malpractice cases. On December 5, 1951, the Committee submitted an interim report which is published herewith for the information of the members of the Association.

OUR committee had hoped by this time to have completed its work and have available to the members of the Bar, lists of physicians and surgeons in all branches of medicine available for employment by plaintiffs' attorneys who are unable to secure their own expert testimony in malpractice cases.

We have worked on the plan previously reported, viz., that a permanent committee of the Bar Association and a permanent committee of the Los Angeles County Medical Association be set up, and that attorneys desiring to employ physicians and surgeons as expert witnesses apply to this joint committee, and if the claim was not frivolous physicians and surgeons would be available for employment. After trying to set up this arrangement in a practical working manner, the committee from the Los Angeles County Medical Association suggested a new plan, which was that they would canvass their members and secure lists of physicians and surgeons in all branches who would be available for employment in malpractice cases, one list to be retained by the Los Angeles County Medical Association, one by the Los Angeles Bar Association, and one to be in the possession of the Presiding Judge of the Superior Court.

This seemed to be the solution to the problem and the Committee from the Los Angeles County Medical Association has been working ever since on compiling such a list. The council of the Association has met and approved the undertaking and a resolution has been approved and passed to the effect that it was ethical and proper for physicians and surgeons to submit their names for such lists and in fact encouraging the physicians and surgeons to do so. There are now more than 5,000 members of the Medical Association and they have not as yet had sufficient time to educate the physicians and surgeons as to the plan. Branch meetings have been held and at these meetings the matter has been discussed and there are several more meetings scheduled.

Dr. Regan of the Los Angeles County Medical Association committee told me today that the actual request for the panel has not yet been made, but the list will be started by February 1 and within six months there will be a completed list which will be available and which I believe will answer the criticism of the public against physicians and surgeons, and also criticism of the lawyers against the physicians and surgeons in regard to securing expert testimony in malpractice cases. The Medical Association is in the best of good faith but you can appreciate that it will take some time to overcome objections and criticism from many of the physicians and surgeons who have not had an opportunity to fully consider and think out the problem.

I would suggest that the matter will probably be concluded within six months or at least by June 1, 1952.

Both your committee and the committee from the Los Angeles County Medical Association have worked honestly and in good faith and I feel that a great deal of progress has been made up to the present time.

/s/ J. MARION WRIGHT,
Chairman, Malpractice Committee.

REPORT ON LOS ANGELES BAR ASSOCIATION

Group Disability Insurance Policy

TWO hundred and forty-six thousand, nine hundred and three dollars and seventy-three cents has been paid members of the Los Angeles Bar Association during the last five years by the National Casualty Company.

In addition to the $246,903.73 which has been paid, $47,209.00 has been set aside as a reserve to cover pending claims. The claims which have been paid plus the reserves on current claims will make a total of $294,112.73, which covers every claim filed since the insurance became effective during the latter part of 1946.

We believe it will be interesting to the members of the Association to be informed of a limited classification of causes for which the amount of $246,903.73 was paid. We requested the National Casualty Company to set up a limited classification and have received the following tabulation:

Heart Diseases	**Accidents**	**Respiratory & Virus Infections**
$61,420.51	$28,606.11	$17,736.49
Tumors & Cancer	**Brain Diseases**	**Miscellaneous**
$18,618.59	$13,648.27	$98,873.76

One Dismemberment claim, $5,000.00 plus, and two Accidental Deaths, $4,000.00.

Claims have been paid promptly. There has not even been occasion to use the Arbitration Clause, which is included in the Master Policy and the Individual Certificates.

The Policy pays $5,000.00 for loss of one hand or one foot, or entire sight of one eye; $10,000.00 for loss of both hands, or both feet, one hand and one foot, or entire sight of both eyes; $2,500.00 for loss of thumb and index finger of either hand; $2,000.00 accidental death indemnity; $200.00 per month for total disability due to accident or sickness; $100.00 per month for partial disability; and $7.00 a day for 70 days hospital benefits plus other incidental coverage.

Fifteen hundred and twenty-seven members of the Association are insured in this Group Plan, or over 60% of eligible membership.

Brothers-In-Law

By George Harnagel, Jr., Associate Editor

George Harnagel, Jr.

THE College of Law of Willamette University, with the approval of the Board of Governors of the **Oregon** State Bar, is offering a free legal research service to practicing lawyers of that state "who, by reason of limited library facilities, are not equipped to obtain authorities on questions of law." Attorneys are requested to send the exact legal question to the college where it will be assigned to a student for the preparation of a memorandum of authorities, with all of the work being under the supervision of the faculty.

It is reported that similar services are maintained by the law schools of the Universities of **Louisville, Virginia** and St. Mary's of **San Antonio.**

* * *

The latest bar association publication to find its way to our desk is the *Pomona Valley Bar News.* Mimeographed on salmon-pink paper (color analysis not guaranteed), its two-page December, 1951, number was hardly as impressive in format as, say, the corresponding number of *The Record of the Association of the Bar of the City of New York,* but it is a much more likely source of information on such topics as the oscillation of sessions of the new Ramona Township Justice Court between Covina and West Covina or the Valley bar-and-baby derby. Moreover, it was the only bar publication to come out flat-footedly for a Merry Christmas, a Happy New Year and (pardon the recollection) a Stanford victory over Illinois.

* * *

California is not the only state with joint tenancy troubles. The last session of the legislature back in **Illinois** undertook "to simplify the procedure involved in the creation" of that tenancy. The bar of the state was divided as to the felicity of the result and Governor Adlai Stevenson vetoed the bill. The following are excerpts from his veto message:

"* * * This is a desirable objective, but there appears to be some reason to believe that this bill is a faulty vehicle for its attainment. It is asserted that the bill will create more problems than it solves.

"* * * Although I recognize that there is always a natural disinclination on the part of lawyers to make changes in any body of doctrine, however archaic, which they have once managed to master, it does seem clear that there is perhaps some basis for those apprehensions. * * *

"I had hoped never to be placed in the position of staying the hand of progress in the matter of modernizing the law of conveyancing. Indeed, there was an anguished period in my law school days when I solemnly vowed that no act of mine should ever stand in the way of erasing the feudal jargon and concepts of property tenure. There is, however, a question as to whether it really was the hand of progress that touched this bill.

"* * * The next session of the legislature can address itself to a more inclusive revision of the law and with, I hope, some prior measure of agreement among the bar, although—lawyers being what they are—this last may be an exercise in self-delusion on my part. Meanwhile, it will not be too serious if practices dating from the time of Henry VIII survive another two years."

* * *

The Public Relations Committee of the **American Bar Association** is sponsoring a bill to provide for the issuance of a special postage stamp in 1953 "in tribute to the American lawyer." The design, it is said, has already been worked out with the assistance of the heraldry expert of Time magazine.

* * *

The Judge has a word for it . . .

"How does one succeed at the Law? By Work. There is no other road to success at the law. Work. More Work. Then More Work. Sad though the fact is, it is a fact that the vast majority of young lawyers do not and will not work; hence many young lawyers do not succeed."—From an address by Honorable E. Barrett Prettyman, Chief Judge of the District Court of the United States for the **District of Columbia,** at a luncheon of the Junior Section of the District's Bar Association.

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COMMENT ON THE FEDERAL RULES FOR DISCOVERY

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that of infirm persons and those living at a distance from the place of trial. They even prohibited references to a master except under special circumstances.

Trial in open Court was a startling novelty to most equity lawyers and at first the rule was evaded by stipulations to take testimony by deposition but this was soon stepped on by the Courts, particularly by the Southern District of New York, and we settled down to twenty-five years of open Court trials, in which delays were reduced to a minimum, wasteful expense was eliminated, and, most important, the Judges heard and saw the witnesses. The importance of hearing and seeing the witnesses can hardly be over-emphasized.

> "A deposition cannot give the look or manner of the witness: his hesitations, his doubts, his variations of language, his confidences or precipitancy, his calmness or consideration. It is the dead body of the evidence without its spirit. *A witness may convince all who hear him testify that he is disingenuous and untruthful and yet his testimony, when read, may convey a most favorable impression.*" So said Judge A. C. Coxe.

A personal incident illustrates the importance of seeing and hearing the witnesses and particularly the parties themselves. Shortly after I began practice there was a murder in the town where I lived and it became a *cause celebre,* subsequently being retold by Lester Pearson as one of the five famous murders in his Selected Murders. The defense attempted to prove an alibi by witnesses who had seen the defendant along the route taken by the murderer. The testimony was printed verbatim in the papers and I read every word. It seemed absolutely convincing; but it happened that I knew some of the witnesses personally and others by their local reputation and knew that they were wholly untrustworthy. Luckily the witnesses faced the judge and the jury and their plausible story was not believed. Later the Governor of Massachusetts walked over the route to see whether the murderer could have made the trip in the time allowed him by the State's attorneys, and found that he could. That case, and a case, which I tried before Judge Learned Hand and in which the defendant's evasive manner proved him to be totally unreliable, taught me how necessary it is to see and hear the witnesses, to observe the expression of their faces and as Judge Coxe said "to note their hesitations." It is always impressive to see how fast an experienced Judge comes to a conclusion as to the reliability of a witness.

In my opinion trial in open Court under the Equity Rules of 1912 was extremely successful. The facts were presented in pretty orderly fashion, the judge acquired knowledge as he went along, he could tell which witness he could rely on and which he could not, he could fill in the chinks in his knowledge by asking a timely question, and, if he felt like it, could decide the case from the bench. Judge Tuttle of Detroit always did, often asking counsel as he dictated his opinion if some statement of fact was correct.

So much for these two old procedures, viz., trial by deposition and trial in open court. Now the picture has changed again and we have this mongrel procedure which is neither trial by deposition nor trial in open Court. The present tendency is for each party to attempt to prove the major part of its case by written interrogatories, demands for admissions, and by taking the depositions of the opposing parties or their officers, under the authority of Rule 26 (d) 2;— in other words by the written, not the spoken

word. Often the most important witnesses are not seen or heard by the Court. What happens in a patent case is typical of civil cases in general. The complaint is filed. It states the cause of action only in the most general terms. The defendant asks for a more definite statement of the claims to be relied upon and of the thing or acts relied upon as infringements of the patent in suit. Next, the answer is filed, and both parties file interrogatories and requests for admissions often running to many pages and requiring an enormous amount of research to answer. Next each side proceeds to examine *in a lawyer's office* "any person" including opposing parties, officers and directors on any subject germane or not germane to the case. This is a licensed fishing expedition—a wearisome exasperating performance for reluctant witnesses and for counsel alike. *There is constant abuse of the privilege of discovery.* The result may be hundreds or even thousands of pages of transcript, often taken up with the wrangling of counsel and containing a minimum of information material to the issues of the case. These depositions are even worse than those taken under the *original* equity rules because Rule 26 (b) expressly sanctions examination as to wholly inadmissible matters.

Within the last six months I have had called to my attention several typical cases. In one the examination covered hundreds of pages, in another it took three weeks, in another the examination went on for more than a year and in another the result was 3000 printed pages of pretrial examination. What sort of justice is this? How can the little man or small company hope to survive litigation in a Federal Court? We now have about the worst and most destructive procedure devised by man to hamper the administration of justice. On top of trial by deposition we have piled the injustices of unlimited discovery.

I have been told—Judge Clark* can tell us if I am incorrect—that at the time the Rules of Civil Procedure were being formulated, the possibility of abuse of the broad privilege of oral examination for discovery was foreseen and considered but that it was thought that it was not a serious danger because the Courts would always have control of the proceedings and could protect the litigants. This expectation has not been fulfilled. *Hickman v. Taylor* has been used to justify many a wide-ranging

*Charles E. Clark, Circuit Judge, U. S. Court of Appeals, Second Circuit. Judge Clark was Reporter on the Advisory Committee which framed the Federal Rules.

but licensed fishing expedition. The Courts have not exercised the control they might and should have—chiefly, I think because the busy Judge shows an obvious distaste for what he considers trivial interruptions but also because in many Courts motions have to go on a list or can be heard only after considerable delay. The fact that it may take two weeks or even a month to get a motion heard is often enough to reconcile a lawyer to some pretty wide deviations from the line of proper interrogation.

There is also a psychological side to this situation. Trial by deposition is a lazy man's choice. Depositions can be taken at the lawyer's convenience, can be adjourned or a new witness called to give the lawyer time to think. It gives a lazy lawyer a chance to prepare as he goes along. Trial in open Court means not only thorough but complete preparation in advance of trial. The lawyer must be ready for whatever may happen.

Trial by deposition also appeals to the lazy or hesitant judge. He can sit at his desk in his chambers and read or doze over depositions; he can rely on the briefs to point out the weak spots and the inconsistencies; he does not have to spend long hours in Court listening to the evidence and sizing up the witnesses by their demeanor; he does not have to rule on the admissibility of the evidence. *So for both Court and lawyer it has become almost a narcotic appeal.*

The rules must be written with scheming and lazy people in view. I fear we assume too high standards both for the lawyers and the judges.

The necessity for unlimited discovery is not apparent to me.

To avoid surprise we have made it harder for the Judge to get at the truth. The dangers of surprise may have been overestimated. Possibly, also, the fear of surprise has its advantages. When a lawyer prepares for trial in the belief that he knows all the facts, he does not prepare as thoroughly as he would if he felt that at the trial something unexpected might come out. Being in fear of the unexpected he prepares more carefully, and this extra care results in smoother and more complete presentation of the evidence which benefits Court and client alike.

Also I question whether the new rules have really saved the Judges any time. When the time required to hear, consider and decide the preliminary motions, the extra time for study of an-

swers to interrogatories and requests for admissions scattered through masses of paper, and the sifting of the wheat from the chaff to the depositions is taken into consideraiton, it may be that the time required of the Court to decide a given case has not really been shortened.

Under the new rules the Judges often fail to see and hear the key witnesses. They lose personal contact with the most important actors in the drama, they lose continuity, and are obliged to listen to the play, or sometimes are tempted to sleep through it, without having learned what it is all about. *I do not for a moment decry the importance of adequate discovery, but however that may be, it is certain that our Judges would be better prepared to decide the case if all the proofs had been taken in their presence.*

Our whole preliminary procedure must be simplified and shortened. At present too much is subordinated to discovery. We must keep in mind always the distinction between discovery and proof. When we allow discovery to go beyond what is necessary for the ascertainment of facts necessary for preparation for trial, we begin to yield to the temptation of proving facts by deposition.

It is easy to point out the troubles with the present practice but not so easy to propose a perfect remedy. I have already suggested that the rules be changed to make depositions taken on discovery inadmissible as proof at the trial but more complete study of the whole matter makes me doubt if this goes far enough. I am beginning to think that we should limit discovery to written interrogatories and should permit depositions to be taken only by order of Court for cause shown and further should require the Court to limit the range of the examination. I can see no harm in requiring that a party state to the Court in advance the precise ground to be covered, and then hold him to it.

But whatever the remedy we must not revert to trial by deposition. We must not give up the great gain which was made when we adopted the Equity Rules of 1912, and we must eliminate the waste, delay and injustice of the present procedure preliminary to trial.

AN EPISODE IN NAVAL JUSTICE

(Continued from page 202)

were "in on the plan," including Crowell and Small; the Captain was to be murdered, the other officers disposed of, one by one; the little boys tossed overboard, the older carried into the plan; that the ship would then sail to the pirate rendezvous at the Isle of Pines; that Spenser in disclosing these things rustled his neckpiece, in which he secreted a written plan.

The Commander thought this a cock and bull story; then there filtered through his mind the matter of the unrest of the crew; the picture of a brigatine Spenser had recently drawn, flying the Jolly Roger; Spenser's cultivation of the crew; and the testimony of the Master of Arms that Spenser had been pumping him for information as to the amount and place of storage of the small arms on the vessel.

Spenser was called before the Commander, who told him that he understood that Spenser aspired to succeed him to the command of the ship, did he know that that would be over his dead body? Spenser said it was all a joke. No paper was found in his neckpiece, but in his gear, in a razor case, there was a document written in strange characters, which Midshipman Rogers

found were Greek. Upon translation, the list named members of the crew, and indicated their probable loyalties, and purportedly assigned them to various tasks in taking the ship. A joke, said Commander MacKenzie—this joke was "apt to cost him his life." Spenser was manacled, forced to lie down on the quarterdeck with a tarpaulin over him, and a watch set to kill him if he made the slightest communication with the crew.

MacKenzie then mustered all hands for inspection. He told them the conspiracy was discovered. The other officers, armed, watched the alleged conspirators whose names were on the list. Some alleged conspirators bore themselves well; but one, Small, gave a jerk to a stay to the foretopmast of the vessel, and it fell down to the deck. Immediately a group gathered round, including some named as alleged conspirators, whose presence there was away from posts of duty.

If the ship was taken, only Crowell and Small could navigate it so they were arrested and placed with Spenser on the quarterdeck. Commander MacKenzie assured Crowell, who protested innocence, that he would be taken home for trial in a court of law. In the small ship, there was no place below where the prisoners could be confined, free from a ready possibility of rescue.

The next day, a steward was found passing money to Spenser. A sailor, Wilson, sharpened a battle axe with a file, an unusual procedure, and was forced to return a handspike to its place at the point of a gun. Mutterings and seditious words were heard among the crew. Crew members collected in knots on the deck. Persons thought unaffected were seen associating with the presumably disaffected. At midnight, four or five men missed muster. At the next relief of the watch, more missed muster, and came up later with phony excuses.

Commander MacKenzie, who had armed the officers, and who had been standing watch himself, counseled with his lieutenants what were they to do? They feared an attempt at rescue of the prisoners might be made at any time. Both agreed that all officers should be assembled, to consider what should be done. Said MacKenzie, "I did not forget that the officers were still boys, and that all the responsibility of the proceeding must rest upon the older and higher officers. Still I was desirous of having their opinion."

The officers met, the Commander not taking part. They commenced taking testimony under oath, reducing it to writing, which each witness signed.

After an all-day session, they reported that the situation was grave, that they did not believe it would be possible to carry the three prisoners to the U. S. three weeks away, and that the only safety for the vessel and crew was that Spenser, Crowell and Small should be put to death. This report was in writing. It stated that others were equally guilty, but that the three were the only ones who could navigate the vessel to the Isle of Pines, to which Spenser had alluded, if a mutiny succeeded.

Commander MacKenzie acted speedily. He appeared in full dress, addressed Spenser and had him read the recommendation. He then informed Spenser and the others that they were to be hung, and gave Spenser 10 minutes to write his father, and recommended he consult his catechism. In the words of the Commander, "He asked if I was not going too far and too fast—'does the law justify you?' * * * In the necessity of my position I found my law; and in that necessity I trust for justification." Spenser then asked for greater time; expressed remorse for what this action would do to his father and mother. The Commander said this action would bring less opprobrium upon them than the action which Spenser had planned to take. Spenser said that this planning for piracy was a mania with him; he had tried it before on the *John Adams* and the *Potomac*, but had not succeeded; but that Crowell and Small were innocent; that "Small" on his list was only an alias for another person. This statement staggered the Commander; but he reflected upon the other evidence, and decided that even if Spenser were hung, the others might still effect mutiny. Spenser asked to be shot, which was denied, and sought an hour with a Bible and Prayer Book, which was granted. Crowell protested his innocence.

The crew were ordered to man three whips to which the condemned men were suspended, and upon the firing of a gun, were to hoist and belay; and officers armed with cutlasses were ordered to cut down any man who did not pull when ordered. Spenser was given leave to give the order to fire the gun, and at his request, coals as well as matches were provided to touch it off, so that there might be no agonizing delay. The crew were mustered,

the men were placed on the hammocks and Small was permitted to make his statement to the crew. This was short, and was in effect, that men were hung for taking the life of another, but he was punished for only talking about it; let this be a lesson to you—God Bless the United States. Crowell protested his innocence. Spenser asked forgiveness of the others for getting them into the scrape. The Commander shook hands with each of the condemned men. Spenser could not give the command; the Commander did. The drum rolled, the gun fired, the colors were broken out, the whips were pulled and belayed. A command for three cheers for the United States was obeyed, the men were piped to supper.

After supper at six bells, the funeral services were read, and the bodies committed to the deep.

The next day was Sunday. The Commander conducted services, and drew moral lessons from the episodes of the preceding days. The laws for the government of the naval service were read. Three cheers were again given for the United States. The Commander then commended his command for their immediate return to full performance of their duty, and the journey to the United States was continued.

Throughout the forty days of the court-martial, members of the ship's company testified. One might well gather from the summary of testimony today that MacKenzie might later have had some doubt about the complicity of Crowell. There was an odd note in his statements, when he took occasion to negative sympathy for Crowell, based on Crowell's final statements of concern for his wife, by intimating that Crowell had made earlier statements impugning his wife's virtue.

One also wonders at the psychology of the men cooped up aboard the *Somers;* how many of their fears were only vague apprehensions? There is no doubt that jitters were rampant. Was Spenser engaging in an adolescent game of playing pirate or did he mean business? Was he plotting piracy or was he basking in the tall tales that Crowell and Small told him of the Spanish Main, of slavers, and the Isle of Pines and Morro Castle? Was he the base son of a distinguished father, or just a screwball?

One after another of the witnesses, however, indicated that the effort was real; that they did not believe that the ship could have been brought safely into the United States, following the arrest of Spenser and the conspirators; that it could not have successfully engaged an enemy under the then current *esprit* of the ship; that MacKenzie, if not a kind commander, was at least a just one.

The findings of the Court of Inquiry were: that there was a mutiny; and that those executed were guilty; that if there had been no execution, there would have been an attempt at rescue and to take the ship, and that such an attempt would have been successful; that the Commander was not bound to risk the safety of his vessel, property of the United States, and to jeopardize the lives of the young and loyal members of the crew, in order to secure the executed men a trial; that the immediate execution of the men was demanded by his duty and justified by necessity.

The court-martial acquitted Commander MacKenzie. The President approved the findings. In later years, MacKenzie was to be a United States emissary to Cuba, and to command a division of artillery during the Mexican War.

There is much to ponder in the account of the episode. It gives an idea of conditions of life on shipboard before radio and steam. It gives an idea of the power of the Commander, and of his responsibility, and of the hold he had on his crew. It deserves comparison with modern solicitude for the men, such as that expressed in the unified system of Military Justice, with which we are now concerned. The situation confronting MacKenzie is a study in psychology.

My own unanswered question is this: If it was possible to convene and hold a council of war, in which all the officers of the vessel participated for an entire day, during which testimony was taken under oath, why would it not have been possible to try the accused?

If you care to puzzle out your own answers, read the transcript published in 1 American State Trials 531.

PROTECTION OF LAWYERS FROM LIBEL

(Continued from page 204)

Imputing Negligence

In 1932 the auditor of the Loyal Order of Moose, Supreme Lodge of the World, made a report on the Duluth, Minnesota, chapter of the organization in which he charged that Leslie S. High, a Duluth attorney, who was also "Dictator" of the local lodge, had advised the lodge and its creditors on a plan of settlement of its debts which was without effect. He referred to the legal work as "a very slipshod, careless, and unsatisfactory job." The lawyer was allowed to recover on the grounds that this language imputed to him breach of duty as an attorney and tended to prejudice him in earning a livelihood in his profession.[7] To charge a lawyer with negligence in his professional work is defamatory and will be compensated with damage.

Charge of Lying

The *Watkins Review*, a newspaper in Watkins Glen, New York, published a story in 1938 charging Harold H. Cassidy, the village attorney, with lying as to certain instructions he had received from the village trustees. In an action for libel lawyer Cassidy collected damages of $10.00 and disbursements on the theory that a charge of lying as to a matter having to do with his status as an attorney was libelous *per se*.[8]

Disbarment

David Paris, a New York lawyer, was charged by the *New York Times* with having been disbarred for submitting forged affidavits. Actually Paris had only been suspended from practice in the Federal District Court for five years, and was still free to practice in the state courts. This inaccurate statement was held to be libelous *per se*, although Paris was unable to prove substantial damage and was awarded judgment for only 6 cents.[9]

Excessive Fees and Fee Splitting

Local 306, of the Motion Picture Machine Operators Union in New York, sent an open letter to its members in which it charged Matthem M. Levy, a New York lawyer, with exacting excessive fees and splitting them with a layman. In an action for libel

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[7]High v. Loyal Order of Moose, 7 N. W. 2d 675 (1943).
[8]Cassidy v. Warner, 9 N. Y. S. 2d 295 (1939).
[9]Paris v. New York Times Co., 9 N. Y. S. 2d 689 (1939).

Levy succeeded on the theory that the charges imputed to him discreditable practice and were libelous *per se*.[10]

The lawyer is peculiarly susceptible to libelous attacks on his reputation. Since the nature of litigation is such that when one party wins the other party perforce loses, losing litigants are frequently dissatisfied and tend to blame their lawyer for the adverse outcome of a case, regardless of the merits. Thus, while the lawyer's reputation is more important to the practice of his profession than is the case in other fields of endeavor, attacks on his reputation are more likely, and, when they occur, the consequences are more severe. The courts, in recognition of this state of affairs, have been helpful in affording the lawyer wide protection in matters affecting his reputation. The above cited situations show the extent to which the courts have gone in other jurisdictions, and they suggest the nature and quality of protection of reputation a lawyer in the District of Columbia can expect.

[10]Levy v. Gelber, 25 N. Y. S. 2d 148 (1941).

OPINION ON LEGAL ETHICS

(Continued from page 210)

The Committee is also informed that stress would be placed upon the desirability of consulting an attorney before trouble develops. It would, as the Committee is likewise informed,, be pointed out that when a lawyer is not known, one may consult the Lawyers' Reference Service of the Los Angeles Bar Association for a list of recommended attorneys.

Canon 40 of the Canons of Professional Ethics of the American Bar Association is properly considered in connection with the instant inquiry. It reads:

> "A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights."

The Committee believes that Canon 40, though referring expressly to publication of written articles, is just as applicable to telecasts or radio broadcasts.

Canon 27 of the Canons of Professional Ethics of the American Bar Association (Advertising, Direct or Indirect) must likewise be considered, although due to its length it is not deemed necessary to set it forth in full in this opinion. The gist of the applicable portion is that solicitation of professional employment by any means, including interviews not warranted by personal relations, is unprofessional.

Opinion 179 (May 8, 1938) of the Committee on Professional Ethics and Grievances, American Bar Association, deals with the propriety of use of radio broadcast facilities by a local Bar Association to acquaint the lay public with the service the legal profession is able to render. Canon 27, above, was thoroughly discussed in the opinion. The opinion recognizes the distinction between teaching the lay public the importance of securing legal services of preventative character and the solicitation of professional employment by or for a particular lawyer.

The point is made that the former tends to promote the public interest and enhance the public's estimation of the profession, while the latter injures the public and degrades the profession. Further, it is properly said that prevention of controversy and

litigation will also improve the social order. It lessens instances in which the lay public may feel that a person's honest intentions and desires have been frustrated by what the layman chooses to call "technicalities" of the law.

In educating the lay public in the benefits of preventative legal services, some possible evils, such as inaccurate or ill-considered advice, must be guarded against:

First, it should be carried on by the organized Bar in order that any semblance of personal solicitation will be avoided.

Second, it should be made plain that the purpose is to give the layman professional information, to enable lawyers as a whole to render better service, to promote order in society, to prevent controversy and litigation, and to enhance the public esteem of the profession.

Third, it must truly and actually be motivated by a desire to benefit the lay public and the plan must be carried out conscientiously so as to avoid the impression that it is actuated by selfish desire to increase professional employment.

Fourth, the plan should be executed in a dignified manner, consistent with the traditions of the legal profession.

It must be noted that Opinion No. 270 (November 30, 1945) of the Committee on Professional Ethics and Grievances, American Bar Association, held that a lawyer may not, even anonymously, answer inquiries as to individual rights, through the medium of a newspaper column. That opinion also held that Canon 35 would be violated in that the relations of a lawyer with those to whom he gives advice should be direct and personal, and must not be exploited by an intervening lay agency.

In its Opinion No. 121 (December 14, 1934), the same Committee mentioned above, reluctantly and with misgivings sanctioned educational articles inserted by a local Bar Association in local papers as "advertisements." Such Committee felt that thus classifying the articles detracted from the dignity of the effort and appeared to be more of an attempt to secure employment for the members of the Association. Opinion No. 175 (August 22, 1950) adopted by this Committee (Committee on Legal Ethics, Los Angeles Bar Association) approved, with caution, the publication of articles by a lawyer using his name, which were for the

purpose of giving information upon the law, but the Committee disapproved any such use of a newspaper to advise inquirers in respect of their individual rights, even anonymously.

Opinion No. 181 (July 25, 1951) adopted by this Committee, held that an attorney may not permit reference to his legal experience in a caption to an article written by him for publication in a non-legal periodical; nor may he invite questions about legal problems from readers for answer in such periodical.

The increasing popularity and widespread use of television inevitably produces new and more complicated problems in many fields. Not the least among those problems is the subject of professional ethics. An attorney appearing as such, even anonymously, on a telecast, thereby exposes himself to the grave possibility that many among the viewing public will conclude that notwithstanding announcements or assurances to the contrary, his personal appearance is actually an advertising effort. Such a conclusion is the more likely when the attorney's presence on the program is the result of commercial sponsorship. The Committee is of the opinion that such a combination of the professional and the commercial in the same program inevitably detracts from the dignity of the legal profession. An attorney under such circumstances is unable to control or direct either the general script of the program or the manner in which it is presented in the overall. Thus, regardless of his conscientious endeavors to conform strictly to the standards of professional conduct, the chances of his efforts being wholly overcome and nullified are both so great and so probable as to compel him to decline to participate.

Inasmuch as the suggestions and occasions for discoursing upon legal principles and problems arise by reason of individual inquiries submitted by the public, the Committee believes that it would be a practical impossibility for the attorney to avoid running afoul of the provisions of Canon 40, Canons of Professional Ethics of the American Bar Association, quoted above. It must be recognized that the opinions heretofore discussed in this opinion consistently disapprove of the use of inquiries from the public as occasions for an attorney expressing his views on legal subjects.

This opinion, like all opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

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OPINION NO. 187

(December 11, 1951)

ADVERTISING—SOLICITATION OF PROFESSIONAL EMPLOYMENT—CHRISTMAS CARDS—CALENDARS. It is unethical for an attorney to distribute calendars with his name, profession, and address inscribed thereon. It is not proper for a law firm, during the Christmas season, to send cards conveying greetings of the season to regular clients of the office, inscribed with the name of the firm.

This Committee has received two inquiries with reference to the propriety of distributing greetings cards during the Chrisfmas season.

The first case involves the distribution of calendars bearing the heading, "Season's Greetings" and inscribed with the name, profession, address and telephone number of the attorney. This inquiry does not state to what group of persons the calendars would be distributed.

Opinion 59 of the Committee on Professional Ethics and Grievances of the American Bar Association states: "The distribution of a diary or appointment book which has an attorney's card imprinted on the cover is a form of advertising and, as such, is improper."

The Committee concludes that it is unprofessional conduct for an attorney to circulate calendars imprinted with his name, profession, address and telephone number for the reason that calendars are intended for display purposes and are used as a common means of advertising; and that such conduct on the part of an attorney would be a violation of Canon 27 of the American Bar Association, and Rule 2, Section a, of the State Bar of California.

The second case involves the distribution to regular clients of a law firm of Christmas cards inscribed with the name of the law firm.

Canon 27 of Professional Ethics of the American Bar Association states in part: "It is unprofessional to solicit professional employment by . . . advertisements . . ."

Rule 2, Section a, of the Rules of Professional Conduct of the State Bar of California states as follows: "A member of the State Bar shall not solicit professional employment by advertisement or otherwise."

Opinion 152 of the Committee on Legal Ethics of the Los Angeles Bar Association concluded that it is not proper for a firm

of attorneys to sponsor an official United States Treasury advertisement for the sale of war bonds in a newspaper of general circulation wherein the name of the firm appears as a sponsor. The Opinion stated, however, that an individual lawyer violates no rule of professional ethics if, without stating his profession or office address, he publicly sponsors such an appeal. It points out that a law firm, as such, has but one function which is the practice of law. A law firm thus has but one reason for its existence, namely, the furnishing of professional services in the field of law practice. Its relationship to the community arises solely from this function and purpose. It follows that a firm cannot advertise itself because this would be an indirect solicitation of professional employment contrary to professional ethics. The cited opinion contrasts a law firm with an individual who has a multiple relationship to the community.

We are of the opinion that it is not proper for a law firm to send cards conveying the season's greetings during the Christmas season, inscribed with the name of the firm, to regular clients of the firm, for the reason that it would have no relationship to the sole function of a law firm which is the practice of law, and for the further reason that except in rare instances of close personal relationship, it would constitute advertising.

This Committee makes a definite distinction between the sending of Christmas cards by a law firm, as such, and the sending of Christmas cards by an individual attorney to his friends. The latter activity, of course, is the right of any individual, acting as a social being.

This Opinion, like all opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

BROTHERS-IN-LAW

(Continued from page 216)

Tired of smog, parking problems, competition?

"Charles S. Thomas is seeking an attorney who might be interested in taking over his established law practice, office, library and home in Paonia, Delta County, Colorado. There is no other practicing attorney in the near vicinity."—From *Dicta*, monthly publication of the **Colorado** Bar Association.

* * *

Following action by the Advisory Committee of the **Missouri** Bar Administration, the Supreme Court of that state has permanently enjoined a layman, one Julius J. Scheske, from engaging in the practice of law. Mr. Scheske's specialty seems to have been the drawing of wills at the flat rate of $7.00 per page.

* * *

A new municipal court act which went into effect in **Ohio** on January 1st has thrown 67 justices of peace out of work.

* * *

In **Maine** justices of the Supreme Court have had their salaries boosted from $10,000 to $11,000 with the chief justice getting $12,000. Superior Court judges were upped from $9,500 to $10,500.

* * *

The Bar Association of the State of **New York** has purchased a building in Albany near the Capitol for use as a permanent headquarters. The building, which is 152 years old, was once the home of New York's governors.

* * *

Junior and senior law students at the University of **Denver** are allowed to represent needy persons in actual trials in the minor courts of Colorado.

* * *

Very civil procedure in Vinton County, **Ohio** . . . "Common Pleas Judge C. W. Smith was host to members of the Vinton County Bar and Law Library Association at a turkey dinner held at Hotel McArthur . . . with all members of the bar present. [And why not?] After dinner pending cases were set for hearing . . ." From the *Ohio Bar*.

* * *

The **North Carolina** Bar Association recently sponsored an Institute on Practice and Procedure in Federal Income Tax Cases in cooperation with the Law School of the University of North Carolina.

* * *

The **Florida** Bar at its last annual convention unanimously approved an amendment to the state constitution which, if adopted at an election to be held later this year, will enlarge the membership of the State Supreme Court by three members. The Board of Governors, anticipating favorable action by the electorate, is conducting a nominating poll of the entire membership of the **Florida** Bar with the intention of placing before the Governor a representative list of persons qualified for appointment to the three vacancies which will be created. Under the rules they have set up the Governors of the State Bar have declared themselves ineligible for nomination.

* * *

Three years in the life of a **Kansas** lawyer: 1947, elected Attorney-General, his first elective office; 1949, appointed to the State Supreme Court, his first judgeship; 1950, elected Governor. The man: The Honorable Edward F. Arn.

* * *

"Several times each year the librarian of a university or college receives an unexpected letter from a lawyer. The letter deals with a bequest naming the library beneficiary of some property. Without proceeding beyond the introductory paragraph of such a letter, the librarian can safely predict that the property is literary, that the bequest is encumbered with undesirable restrictions, that the property has little monetary and much association value, and that the library probably has the item or items in its collection.

"If the bequest is not literary property, it is likely to be a stamp collection, which the library cannot afford to maintain, or a group of carved walrus-tusk miniatures, which are properly museum objects. In the case of literary property, the librarian adopts a resigned attitude, and accepts the bequest. In case the bequests are other than literary, benign resignation is not enough, for, if such gifts are accepted, the librarian must find proper display facilities for them, or at least be prepared to remove

them from storage whenever the decedent's family arrives to check on compliance with the provisions of the will. * * *

"Intelligent and sympathetic appraisal of the book assets of an estate should be made before such assets are made the subject matter of a will. Any less careful consideration results in defeating the purpose of the bequest, which is, presumably, to enrich some library with desirable books which the library does not possess. * * *"—From "The Lawyer and the Library," by Martin Schmitt, Curator of Special Collections, University of **Oregon** Library. Reprinted from the *Oregon Law Review*.

* * *

The **Minnesota** State Bar Foundation has awarded scholarships to nine law students.

* * *

A Central **Oregon** Bar Association has been formed to unite several of the county bar groups of the "high country" in that state.

* * *

From the 1951 Report of the Treasurer of the **Illinois** State Bar Association:

"For the past few years your treasurer's annual report has, in the main, contained explanations of why there was an operating deficit for the year and the reasons which compelled the Board of Governors to raise the dues.

"I am happy to say that this report need contain no such explanations. It now appears that the income to be derived from membership dues at the present rates will be sufficient to finance the activities of the association at the present level and at the same time provide an adequate fund from which the cost of an effective public relations program can be paid. . . ."

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The **Wisconsin** Bar Association has made hospital insurance (Blue Cross) and surgical-medical insurance (Blue Shield) available to its members on a group basis which affords "much more protection than is available under individual policies."

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The **New York** Legal Aid Society recently celebrated its 75th year of continuous service with a banquet in the ball-

room of the Waldorf-Astoria. It began rather modestly, in 1876, as the Deutscher Rechts-Schutz Verein for the purpose of providing legal advice and representation to German immigrants. The word spread fast and soon immigrants from other countries and then native-born Americans began to avail themselves of its services. In 1896 its present name was adopted. Today it employs 27 full-time lawyers and 25 clerical workers and investigators and utilizes many volunteer lawyers. Its annual budget is around $300,000.

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The **Cincinnati** Bar Association and the University of Cincinnati are jointly conducting an institute for law office secretaries.

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From a recent report of the work of the Board of Commissioners of the **Utah** State Bar:

> "Complainant alleged that upon going into a Salt Lake law firm office to consult in connection with a matter, one member became very angry, called her names, and ordered her out of the office. The Investigating Committee reported that they were of the opinion that disciplinary action could not be predicated on the adverse personality and peculiar traits of lawyers that antagonize, embarrass or humiliate people who come to their office."

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A survey of **Iowa** lawyers indicates that they desire liability insurance and a Special Committee of the State Bar is endeavoring to develop information on coverage and rates.

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There are over one thousand women who have taken up law. The other fifty million are laying it down.—From "Detours," a department of *The National Motorist*.

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The **Colorado** Bar Association is sponsoring, for the third consecutive year, a series of radio programs entitled "You and The Law." The programs are being broadcast in seven other states under the auspices of local bar associations by arrangement with the Colorado Association. The sales to other bar associations largely defray the program production costs.

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